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No. 99-1178

In The
Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF AMICUS CURIAE OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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3 pp

QUESTION PRESENTED

Whether the court below was required under the Chevron doctrine to defer to the Corps' interpretation of its authority to regulate wildlife habitat under the Federal Water Pollution Control Act of 1972 ("Clean Water Act"), when Congress has evidenced no intent to grant the Corps such authority under other wildlife protection statutes and has instead granted such authority to other agencies?

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of Petitioner.[1] Both parties and the intervenor have consented to the filing of this brief. Those letters of consent have been lodged with the Clerk of this Court.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* (its members or counsel) contributed financially to the preparation of this brief.

special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

This case involves an assertion of regulatory jurisdiction by the U.S. Army Corps of Engineers ("Corps") under Section 404 of the Federal Water Pollution Control Act ("Clean Water Act") over 17.6 acres of privately owned land.

In 1987, the Corps originally concluded that it had no regulatory jurisdiction over the 17.6 acres of isolated wetland at issue in this case because the wetland did not meet the regulatory "definition of a wetland or lakes" or the broader definition of "'waters of the United States.'" Petitioner's Appendix ("Pet. App.") at 3a-14a, 16a. Later that same year, however, the Corps reversed its position and asserted that it did in fact have jurisdiction over the 17.6 acres because the land was or could be "habitat" for migratory birds. Pet. App. at 4a, 16a. Accordingly, pursuant to Section 404 of the Clean Water Act, the Corps denied petitioner's wetland permit application. *Id.*

The Corps' assertion of jurisdiction over the 17.6 acres of land in this case is not based on an express statutory grant of authority for the Corps to regulate wildlife habitat in non-navigable waters, nor upon an independent analysis of the Clean Water Act by the court below, but solely upon the

agency's interpretation of its own jurisdiction, to which the court below deferred. Pet. App. at 4a-13a.

Specifically, the court below held that it was required by the Chevron doctrine, set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), to defer to the Corps' interpretation of its jurisdiction under the Section 404 permitting program of the Clean Water Act. Pet. App. at 9a.

SUMMARY OF ARGUMENT

In determining whether or not Congress had in fact delegated regulatory authority over non-navigable migratory bird habitat to the Corps, the court below held that it was required to "review [the Corps'] interpretation of a statute it is charged with administering under the standard outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Pet. App. at 9a. The Chevron doctrine states that a court must defer to a reasonable

interpretation of an ambiguous statute offered by the agency charged with administering the statute. *Chevron*, 467 U.S. at 844-45. This doctrine rests in part on the practical premise that agencies have superior technical expertise upon which Congress is entitled to call upon in the enactment of statutes that delegate to these expert agencies the role of fleshing out the details of the regulatory scheme through regulations. However, as this Court has noted, the constitutional heart of *Chevron* consists of appropriate judicial deference to legislative enactments (including delegation of some policy-making to the executive branch) which underlies the separation of powers doctrine:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While

> agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities. . . . The responsibilities for assessing the wisdom of such policy choices are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 865-66 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

This Court has never held, however, that the legal determination of what power Congress has delegated to an agency (and what regulatory power Congress has withheld) turns on the agency's policy determinations, rather than the traditional rules of statutory construction employed by the courts. To the contrary, last term, this Court held that although judicial deference is appropriate to an agency's statutory interpretation, the reviewing court must

nevertheless assure that the agency's interpretation is not "'inconsistent with the administrative structure that Congress enacted into law.'" *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1297 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). This Court further held:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or--ambiguity of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic

> and political magnitude to an administrative agency.

Id. at 1300-01 (citations omitted).

In the present case, the court below ignored these established canons of statutory construction, effectively converting the task of determining the outer limits of Corps jurisdiction from one of statutory construction into a policy matter to be decided by the Corps itself. By deferring to the agency's policy determination as to its jurisdiction under the Clean Water Act, or the migratory bird rule which provides that the Corps can require a dredge and fill permit for isolated wetlands if the Corps believes that such wetlands are or could be habitat for migratory birds, the court below allowed the agency to define for itself the regulatory authority that Congress *should* have granted it as a policy matter, and not the legal question of whether Congress had, in fact, delegated such authority to the Corps.

In consequence, the court below completely ignored the fact that Congress has developed an entirely separate scheme for migratory bird protection: the Migratory Bird Treaty and the Migratory Bird Treaty Act of 1918, the treaty's implementing statute. 16 U.S.C.A. §§ 703-712 (West 1985 & Supp. 2000). Moreover, Congress has established special protections for particular species, e.g., the Bald and Golden Eagle Protection Act, 16 U.S.C.A. §§ 668-668d, and generally for threatened and endangered species, the Endangered Species Act, 16 U.S.C.A. §§ 1531-1544. Congress has also created refuges, national seashores, wilderness areas, national parks, national marine sanctuaries and other specific designations that are designed to provide habitat for migratory birds and wildlife. *See, e.g.*, National Park Service Organic Act of 1916, 16 U.S.C.A. §§ 1-18f-3; Refuge Recreation Act of 1962, 16 U.S.C.A. §§ 460k-460k-4; Wilderness Act of 1964, 16 U.S.C.A. §§ 1131-1136; National Wildlife Refuge System Administration Act of

1966, 16 U.S.C.A. §§ 668dd-668ee; Fish and Wildlife Conservation Act of 1980, 16 U.S.C.A. §§ 2901-2912; National Marine Sanctuaries Act, 16 U.S.C.A. §§ 1431-1445b.

In this entire scheme, the Army Corps of Engineers has no role, except to follow the dictates of those lead agencies to which Congress has, in fact, delegated such authority. *See Bennett v. Spear*, 520 U.S. 154, 154 (1997) (noting Corps must seek biological opinion from Fish and Wildlife Service under Section 7 of the Endangered Species Act when proposed potentially affects certain wildlife). Indeed, had Congress wanted to give the Corps authority over wildlife habitat protection under any of these statutes, or to implicate the Corps' permitting authority under Section 404 of the Clean Water Act, there is no reason why it could not have done so.

In short, under the regulatory scheme adopted by Congress, there is nothing to even suggest that Congress ever

intended that the Corps exercise the Clean Water Act's Section 404 permitting authority over isolated wetlands solely because of the presence of migratory birds. The court below's decision to defer to the agency's policy determination regarding its own jurisdiction not only fails to take into account Congress' overall administrative scheme with respect to the Clean Water Act and numerous wildlife protection statutes, but also runs afoul of the inherent limitation of the Chevron doctrine – separation of powers. Since Congress evidently did not intend to delegate wildlife habitat protection authority to the Corps, the Corps' usurpation of that authority for itself turns on its head the very notion of separation of powers.

ARGUMENT

I. JUDICIAL DEFERENCE TO THE CORPS' MIGRATORY BIRD RULE CONFLICTS WITH THE SEPARATION OF POWERS DOCTRINE.

The migratory bird rule began life as an example

contained in the preamble to a regulation interpreting the Corps' jurisdictional authority under the Clean Water Act. *See* 33 C.F.R. § 328.3(a)(3) (2000); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 42,217 (1986). The proposed regulation, but not the preamble, was published for notice and comment. 51 Fed. Reg. 41,206. When the final rule was published, the Corps included in the preamble several examples of how the regulation might be applied by the Corps. 51 Fed. Reg. at 41,217. One of those examples, now known as the migratory bird rule, states that the Corps may assert jurisdiction over an isolated wetland if the wetland is or could be habitat for migratory birds. *Id.*

The court below held that it was required to defer to the migratory bird rule because even though it was not published for notice and comment, the Chevron doctrine requires "the court [to] defer to the agency interpretation so long as it is based on a reasonable reading of the statute."

Pet. App. at 9a, 11a-12a. In point of fact, however, *Chevron* does not hold that a reviewing court must turn a "blind eye" to any interpretation of its jurisdictional authority so long as the court can conclude it is "reasonable."

Indeed, subsequent decisions make it clear that even when deferring, the reviewing court must take steps to ensure that the agency's construction of a statute it is charged with enforcing is "reasonable, in light of the language, policies, and legislative history of the Act . . . ." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (examining statutory language, policies, and legislative history of the Clean Water Act to determine whether Congress intended for the Corps to exercise jurisdiction over adjacent wetlands); *see also Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) (examining Congress' overall regulatory scheme in determining whether FDA had authority under the Food, Drug, and Cosmetic Act to regulate tobacco products).

Moreover, the rule of judicial deference to agency interpretation of a statute has no application where the issue before the court is: What authority did Congress delegate to the agency in the first instance? Neither of the two rationales set forth in *Chevron* (agency expertise and Congressional intent to delegate the power to implement a statute and make policy choices through regulation) applies when the court, as here, is required to define the extent of the agency's authority under a statute such as the Clean Water Act. *Chevron*, 467 U.S. at 842-45, 865-66.

First, the Corps of Engineers has no particular expertise in determining the nature and extent of the authority of Congress granted to it under Section 404 or, for that matter, under any other statute authorizing Corps' activities. To the contrary, it is the court that possesses both the expertise and the constitutional duty of interpreting the nature and extent of the power granted by Congress to an agency such as the Corps, and what power has not been so

granted is therefore reserved to the States or the people themselves, respectively, under the Tenth Amendment. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); U.S. CONST. amend. X.

Second, Congress cannot have intended to delegate to the Corps the power to define its own authority under Section 404 of the Clean Water Act, for this would amount to delegate of legislative authority without any of the necessary standards or limitations. *See, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 371-74 (1989); *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted Browner v. American Trucking Ass'n, Inc.*, 120 S. Ct. 2003 (2000) *and American Trucking Ass'n, Inc. v. Browner*, 120 S. Ct. 2193 (2000). The extent of the permitting authority delegated to the Corps by the Clean Water Act – i.e., over the permitting of dredge or fill material

into navigable waters at specified disposal sites – does not and could not, consistent with separation of powers, include the authority to append "and migratory bird habitat" to that statutory authorization. *See* 33 U.S.C. § 1344 (West 1986 & Supp. 2000). Congress, in Section 404, gave the Corps regulatory power over certain activities – no more and no less – and no interpretation or regulation can augment that statutory authority.

Indeed, it may fairly be said that the sole measure of the lawfulness of a regulation is whether it falls within or without the power given that agency by Congress. *See United States ex rel. O'Keefe v. McDonnel Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside.") (citing 5 U.S.C. § 706(2)(C) (1994)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979) (regulations must be

struck down unless reviewing court is "reasonably [ ] able to conclude that the grant of authority contemplates the regulations issued."); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them.").

Thus, it is the role of the court in the first instance to determine the nature and extent of regulatory authority granted to an agency by Congress. When, as here, the court withholds it own legal analysis of the statute and defers to the agency's determination as to its own statutory authority, it becomes the agency and not the court that exercises the quintessentially judicial power of declaring what the law is.

The court below thus erred by allowing the Corps of Engineers to determine the extent of its own authority by "deferring" to the Corps' policy determination that the term "navigable waters" includes protection of "migratory bird habitat" on non-navigable wetland.

II. JUDICIAL DEFERENCE TO THE CORPS' MIGRATORY BIRD RULE CONFLICTS WITH CONGRESS' ADMINSTRATIVE STRUCTURE FOR WILDLIFE PROTECTION, WHICH DOES NOT GRANT ANY ENFORCEMENT AUTHORITY TO THE CORPS.

Under the regulatory scheme Congress has developed for migratory bird protection, the Corps is at best a bit player. Of the several comprehensive wildlife protection statutes Congress has enacted, the Corps has not only been denied a primary administrative role, but, in fact, has been required by Congress to first consult with other federal agencies before taking any action that may affect certain wildlife. *See, e.g.*, 16 U.S.C.A. § 1536 (West 1985 & Supp. 2000) (under the Endangered Species Act, requiring Corps to consult with the Fish and Wildlife Service ("FWS")); 16 U.S.C.A. § 662 (under the Fish and Wildlife Coordination Act, requiring Corps to consult with FWS); 16 U.S.C.A. § 1456 (under the Coastal Zone Management Act, requiring Corps to consult with the National Oceanic and Atmospheric Administration

(under the Department of Commerce)); *see also* 33 C.F.R. § 320.4 (2000); 50 C.F.R. pt. 402 (2000).

The U.S. Fish and Wildlife Service (as part of the Department of Interior) is the lead enforcement agency over the Migratory Bird Treaty and the Migratory Bird Treaty Act passed to implement it. 16 U.S.C.A. § 704. Likewise, the Fish and Wildlife Service (again, as part of the Department of Interior) is the lead agency Congress has designated to enforce special protections for particular species, e.g., the Bald and Golden Eagle Protection Act, 16 U.S.C.A. § 668b, and generally for threatened and endangered species, the Endangered Species Act, 16 U.S.C.A. § 1533.

The Department of Interior (U.S. Fish and Wildlife Service and Bureau of Land Management) and the National Oceanic and Atmospheric Administration ("NOAA") (under the Department of Commerce) administer national refuges, national seashores, wilderness areas, national marine sanctuaries, and national parks that Congress has designated

to provide habitat for migratory birds and wildlife. *See, e.g.*, National Park Service Organic Act of 1916, 16 U.S.C.A. § 1a-2; Refuge Recreation Act of 1962, 16 U.S.C.A. § 460k; Wilderness Act of 1964, 16 U.S.C.A. § 1132; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C.A. §§ 668dd-668ee; Fish and Wildlife Conservation Act of 1980, 16 U.S.C.A. §§ 2902, 2904; National Marine Sanctuaries Act, 16 U.S.C.A. §§ 1432-33, 1437.

In this entire scheme, the Army Corps of Engineers has no role, except to follow the dictates of those lead agencies to which Congress has, in fact delegated such authority. *See Bennett v. Spear,* 520 U.S. 154, 154 (1997) (noting Corps must seek biological opinion from Fish and Wildlife Service under Section 7 of the Endangered Species Act when proposed potentially affects certain wildlife); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 607 (3d Cir. 1974) ("It is clear that Congress intended that the Army Corps of Engineers and the Secretary of the Army would

consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation. The federal environmental protection statutes did not, however, by their terms enlarge the jurisdiction of the Army Corps of Engineers . . .").

Likewise, there is nothing in the Clean Water Act that suggests that Congress wanted to give the Corps authority over wildlife habitat protection under any of these statutes, or to implicate the Corps' permitting authority under Section 404 of the Clean Water Act. In 1972, Congress substantially amended the Federal Water Pollution Control Act, commonly known as the "Clean Water Act," by establishing for the first time a comprehensive program of regulations and permits to control water pollution. Pub. L. No. 92-500, 86 Stat. 816 (1972). The statute forbids "the discharge of any pollutant by any person" except in accordance with a statutory scheme which requires a permit for most "point source" pollutant discharges into "navigable waters." 33 U.S.C.A. §§ 1311(a),

1362(12). Congress has charged EPA with lead responsibility of eliminating all water pollution discharges by 1985. 33 U.S.C.A. § 1251(a), (d).

The role of the Corps under the Clean Water Act is a narrow one: to issue permits for the discharge of a very specific pollutant (dredge and fill material) at specific places (at specified disposal sites in navigable waters). Even this limited permitting authority is subject to EPA's review and veto of Corps-issued permits. 33 U.S.C.A. § 1344(c). It is thus EPA, and not the Corps, to which Congress delegated primary responsibility for administering the Clean Water Act. 33 U.S.C.A. § 1251(d); *see also* 43 Op. Att'y Gen. 15 (1979).

In practice, Section 404 dredge and fill permits may be issued by the Corps, after notice and comment. 33 U.S.C. § 1344(a). However, the substantive water protection criteria that permit applicants must meet are established in guidelines developed by EPA in conjunction with the Corps. 33 U.S.C.

§ 1344(b). EPA has also promulgated substantive regulations, binding on the Corps, regarding dredge and fill permits. 40 C.F.R. pt. 230 (2000).

Ironically, in determining that the Corps' migratory bird rule was consistent with the Clean Water Act, the trial court in this case cited to the fact that EPA is the agency granted authority under the statute to promulgate regulations in order to protect fish and wildlife. Pet. App. at 29a (quoting 33 U.S.C. § 1343(c)(1)). There is nothing in the Clean Water Act cited by either court below that authorizes the Corps to issue Section 404 permits in order to protect migratory birds or any other kind of wildlife.

Finally, in 1985, this Court held in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), that Congress had granted the Corps authority under the Clean Water Act to exercise its Section 404 permitting authority over wetlands adjacent to navigable waters as was necessary to protect water quality. *Id.* at 133. The *Riverside Bayview*

Court concluded that adjacent wetland protection was consistent with Congress' concern over protecting entire aquatic ecosystems because adjacent "wetlands may affect the water quality of the adjacent lakes, rivers, and streams." *Id.* at 133-34. Applying that reasoning to the case at bar, there is nothing that implies that the Corps' jurisdiction under the Clean Water Act can be extended to non-adjacent wetlands for purposes of migratory bird habitat protection.

CONCLUSION

For all of these reasons, *amicus curiae* urges this Court to reverse the decision below.

Respectfully submitted,

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